

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRAIG R. JALBERT, IN HIS CAPACITY AS
TRUSTEE OF THE F2 LIQUIDATING TRUST,
on behalf of himself and all others similarly
situated,

Plaintiff,

v.

SECURITIES AND EXCHANGE COMMISSION,

Defendant.

Civil Action No. 17-12103

**DEFENDANT SECURITIES AND EXCHANGE COMMISSION'S
MOTION TO DISMISS THE COMPLAINT**

Defendant, the United States Securities and Exchange Commission (the “SEC” or “Commission”), moves, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), to dismiss the Complaint filed by Plaintiff Craig R. Jalbert, in his capacity as the Trustee of the F2 Liquidating Trust (the “Trust”), which is the successor in interest to F-Squared Investment Management, Inc. (together with its subsidiaries, “F-Squared”). The Court lacks subject matter jurisdiction because the Trust is challenging a final Commission order that is subject to statutory judicial review schemes in the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*) and the Investment Advisers Act of 1940 (15 U.S.C. 80b-1 *et seq.*) that require challenges to a Commission order to be filed exclusively in the courts of appeals within 60 days of the order’s issuance. *See* 15 U.S.C. 80a-42, 80b-13.

Even if the Court had jurisdiction, the Court should dismiss the Complaint because the Trust has failed to state a cause of action upon which relief may be granted. Relief under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, is available only when there is no other

adequate remedy in court, but the statutory review schemes identified above provided F-Squared with an adequate opportunity for judicial review, which it chose not to pursue when it entered into a voluntary settlement with the Commission. Further, res judicata precludes the Trust from relitigating a final Commission order imposing disgorgement.

For these reasons, as well as those set forth in the accompanying memorandum of law, the SEC respectfully requests that this Court dismiss Plaintiff's Complaint.

Respectfully submitted.

Dated: April 4, 2018

/s/ Matthew S. Ferguson
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CERTIFICATE OF SERVICE

I, Matthew S. Ferguson, hereby certify that this document was filed on this date through the ECF system and will be sent to the registered participants as identified on the Notice of Electronic Filing (NEF) as of the date of this filing.

Dated: April 4, 2018

/s/ Matthew S. Ferguson

LOCAL RULE 7.1(a)(2) CERTIFICATION

The undersigned counsel certifies that on April 2, 2018, he conferred with Plaintiff's counsel in accordance with Local Rule 7.1(a)(2) in connection with this motion.

Dated: April 4, 2018

/s/ Matthew S. Ferguson